

HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,)
)
Plaintiff,)
)
v.)
)
JENNIFER QUAN, in her official capacity)
as Acting Regional Administrator for the)
National Marine Fisheries Service, *et al.*,)
)
Defendants,)
)
and)
)
ALASKA TROLLERS ASSOCIATION,)
and STATE OF ALASKA,)
)
Defendant-Intervenors.)
_____)

Case No. 2:20-cv-00417-RAJ-MLP

PLAINTIFF'S MOTION FOR AN
AWARD OF FEES AND COSTS

NOTE ON MOTION CALENDAR:
January 2, 2025

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GLOSSARY OF ACRONYMS

AR	Administrative Record
BiOp	Biological Opinion
EAJA	Equal Access to Justice Act
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
SEAK	Southeast Alaska
SRKW	Southern Resident killer whales

I. MOTION.

Plaintiff Wild Fish Conservancy (“Conservancy”) respectfully moves for an award of attorneys’ fees and costs against Federal Defendants National Marine Fisheries Service, et al. (“NMFS”) under the Equal Access to Justice Act (“EAJA”) and section 11(g)(4) of the Endangered Species Act (“ESA”) totaling \$2,278,891.00 plus fees and costs incurred between the filing of this motion and the final determination thereon. The Conservancy and NMFS conferred regarding the relief requested herein but have been unable to reach agreement. Fifth Decl. of Brian A. Knutsen (“Fifth Knutsen Decl.”) ¶ 3.

II. INTRODUCTION.

The Conservancy is entitled to an award of fees and costs because it prevailed on all claims. The amount requested is warranted because the Conservancy obtained an excellent outcome and because the proposed hourly rates and hours expended are reasonable.

The Conservancy brought this case over concerns that NMFS approved commercial salmon harvests in Southeast Alaska, and adopted increases in hatchery production in the Pacific Northwest, without adequate ESA review to protect endangered Southern Resident killer whales (“SRKW”) and threatened Chinook salmon and without evaluations and public vetting under the National Environmental Policy Act (“NEPA”). This litigation was contentious, drawing intervention from the State of Alaska and an industry association, and spanned nearly five years. In the end, the lawsuit generated two public NEPA processes, culminating in two environmental impact statements (“EIS”), and two new ESA consultations that produced two biological opinions (“BiOp”) that impose extensive new restrictions intended to protect ESA-listed species. That is an excellent result under any measure.

The Conservancy has expended significant efforts pursuing this citizen suit, with its attorneys incurring nearly 5,000 hours. Those attorneys have worked on a contingency basis, as the Conservancy would have been unable to bring this lawsuit if it was required to pay attorney fees. EAJA was enacted for cases like this—to create “a level playing field in cases in which there is an imbalance of power and resources” by reducing financial disincentives for those who

1 seek to challenge illegal agency conduct. *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d
 2 1147, 1179 (9th Cir. 2019) (en banc). EAJA accomplishes this by ensuring that plaintiffs like the
 3 Conservancy are awarded their fees and costs after succeeding in litigation challenging unlawful
 4 agency action.

5 **III. BACKGROUND.**

6 The United States and Canada reached an agreement under the Pacific Salmon Treaty in
 7 2018 that set harvest limits for certain fisheries for 2019 through 2028. *See* AR 47194–95.
 8 NMFS consulted under the ESA on those fishing regimes for Southeast Alaska and issued a
 9 BiOp in April 2019 (“SEAK BiOp”). AR 47173–76. While the 2019 Pacific Salmon Treaty
 10 reduced harvests somewhat, it was insufficient for SRKWs and Puget Sound Chinook salmon.
 11 AR 47201–02. NMFS therefore included three mitigation components in the SEAK BiOp,
 12 including the prey increase program that sought to increase hatchery production in the Pacific
 13 Northwest. AR 47202–03.

15 The SEAK BiOp concluded that the fisheries are not likely to jeopardize ESA-listed
 16 species and included an incidental take statement (“ITS”) for the fisheries. *See* AR 47517–527.
 17 The only “take” limit imposed on the fisheries for the protection of SRKWs and Chinook salmon
 18 was the harvest limit under the 2019 Pacific Salmon Treaty; i.e., so long as the fisheries did not
 19 harvest more salmon than permitted under the Treaty, the fisheries were in compliance with the
 20 take limits for SRKWs and threatened Chinook salmon. AR 47518–19. The ITS did not impose
 21 any restrictions on the prey increase program to reduce harm to threatened salmonids. *See* AR
 22 47518–19, 47524–27.

24 The Conservancy brought suit on March 18, 2020 over concerns that the SEAK BiOp
 25 failed to adequately evaluate impacts from the fisheries and the prey increase program and to
 26 ensure that those activities will not jeopardize SRKWs and Chinook salmon. Dkt. 1; Decl. of
 27 Emma Helverson (“Helverson Decl.”) ¶ 13. The Conservancy was also concerned that NMFS
 28 approved the fisheries and the prey increase without any public input or other processes under
 29 NEPA. *Id.* The complaint alleged three claims: (1) NMFS failed to ensure that its actions would

not jeopardize ESA-listed species in violation of section 7(a)(2) of the ESA by adopting and implementing the SEAK BiOp; (2) NMFS's SEAK BiOp is arbitrary, capricious, and not in accordance with law; and (3) NMFS adopted and implemented the SEAK BiOp in violation of NEPA. Dkt. 1 ¶¶ 114–19. The Alaska Trollers Association and the State of Alaska intervened on April 23, 2020 and March 30, 2021, respectively. *See* Dkts. 25, 88.

The Court granted the Conservancy's motion for summary judgment on liability on all three claims and denied NMFS's and the intervenors' cross-motions on August 8, 2022. Dkts. 111, 122. The Court held that the SEAK BiOp was not in accordance with the ESA, that NMFS was violating its substantive duty under section 7 of the ESA to ensure that its actions do not jeopardize ESA-listed species, and that NMFS violated NEPA by not providing any NEPA procedures for the ITS authorizing the fisheries and for the prey increase program. Dkt. 111 at 25–38.

The Court partially granted the Conservancy's motion on remedies on May 2, 2023. Dkts. 144, 165. The Court granted the Conservancy's requests to remand the SEAK BiOp to NMFS with instructions to remedy the ESA and NEPA violations and to partially vacate the ITS for the fisheries. Dkt. 144 at 39–40. The Court denied the Conservancy's request to vacate or enjoin the prey increase program. *Id.* at 40.

All parties appealed. Dkts. 167, 170, 171, 186. The Ninth Circuit issued a memorandum disposition on August 16, 2024 reversing the Court's partial vacatur of the ITS for the fisheries and affirming the decision to leave the prey increase program in place during remand. Dkt. 199. The Ninth Circuit emphasized NMFS's commitment to limit the remand period during which time its illegal actions would remain in effect, noting the agency committed to issuing new decisions by December 1, 2024. *Id.* at 8.

In response to this Court's remand, NMFS underwent two public NEPA processes, one for the fisheries and one for the prey increase program, and completed two EISs in September 2024. *See* Fifth Knutsen Decl. 49–50, 87, 89. In addition to public meetings and Tribal conferrals, NMFS received nearly 1,400 written comments from a range of interested parties

during these NEPA processes. *See* Fifth Knutsen Decl. 50, 89. NMFS also completed two new ESA section 7 consultations and issued two new BiOps in September 2024. *See id.* at 67, 70, 100, 103. As a result of these processes, NMFS imposed new take limits on the fisheries to protect SRKWs and Chinook salmon; i.e., NMFS applied take limits beyond the Pacific Salmon Treaty’s harvest caps, which was the only limit in the SEAK BiOp for SRKWs and Chinook salmon. *Id.* at 75–80. Similarly, the prey increase program BiOp included an ITS that imposed all new limits and requirements on that program. *See id.* at 107–12.

IV. ARGUMENT.

A. The Conservancy Is Entitled to a Fee Award Under EAJA and the ESA.

EAJA authorizes a fees and costs award for the second and third claims, challenging the SEAK BiOp and NMFS’s NEPA compliance, because they arise under the Administrative Procedure Act, which does not otherwise provide for such awards. *See* Dkt. 1 ¶¶ 117, 119; 28 U.S.C. § 2412(d)(1)(A). The Conservancy meets EAJA’s “party” definition for fee awards. *See* 28 U.S.C. § 2412(d)(2)(B); Helverson Decl. ¶ 3. The ESA citizen suit provision authorizes fee awards for the first claim, alleging that NMFS violated its substantive duty to ensure that its actions do not jeopardize ESA-listed species. *See* Dkt. 1 ¶ 115; 16 U.S.C. § 1540(g)(4). The Conservancy is entitled to an award under both EAJA and the ESA because it prevailed on its claims and because EAJA’s additional conditions are satisfied.

1. The Conservancy is a prevailing party.

Under EAJA and the ESA, a party that prevailed is entitled to an award of fees and costs. *See* 28 U.S.C. § 2412(d)(1)(A); *Ctr. for Biological Diversity v. Marine Point Dev. Co.*, 560 F.3d 903, 915 (9th Cir. 2009)¹; *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1093–94 (9th Cir. 2021) (interpreting citizen suit provisions similar to the ESA to require fee awards to prevailing

¹ The Ninth Circuit no longer requires parties seeking an award show that the lawsuit made contributions to the ESA. *See Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1093–96 (9th Cir. 1999). Regardless, that test is met here because this lawsuit resulted in greater protections for ESA-listed species and provided guidance on ESA interpretation.

1 plaintiffs in the absence of rare special circumstances).

2 Parties prevail where “they succeed on any significant issue in the litigation which
3 achieves some of the benefit” sought. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also*
4 *St. John’s Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1059 (9th Cir.
5 2009) (“[A]n extremely small amount of relief is sufficient[.]”). The Conservancy is plainly a
6 prevailing party because it prevailed on all three claims and the Court remanded the SEAK BiOp
7 with instructions for NMFS to address the violations. *See* Dkt. 111 at 25–38, 39; Dkt. 144 at 39–
8 40; *Wood v. Burwell*, 837 F.3d 969, 973–78 (9th Cir. 2016).

9
10 **2. NMFS’s position was not substantially justified.**

11 Courts “shall award” fees to prevailing plaintiffs under EAJA unless the defendant’s
12 position was “substantially justified.” 28 U.S.C. § 2412(d)(1)(A); *see also Thomas v. Peterson*,
13 841 F.2d 332, 335 (9th Cir. 1988). The government has the burden of proving that it was
14 substantially justified “on the whole” for the entire action. *United States v. Marolf*, 277 F.3d
15 1156, 1160–61 (9th Cir. 2002); *see also Comm’r, Immigr. & Naturalization Serv. v. Jean*, 496
16 U.S. 154, 158–62 (1990).

17 To preclude fees, a defendant’s position, meaning the challenged agency decision **and** its
18 litigation position, must have a “reasonable basis **both** in law and fact.” *Pierce v. Underwood*,
19 487 U.S. 552, 565 (1988) (emphasis added); *see* 28 U.S.C. § 2412(d)(2)(D). Thus, “[a]
20 reasonable litigation position does not establish substantial justification in the face of a clearly
21 unjustified underlying action.” *Marolf*, 277 F.3d at 1163–64; *see also Or. Nat. Desert Ass’n v.*
22 *Bureau of Land Mgmt.*, 223 F. Supp. 3d 1147, 1152 (D. Or. 2016). Even in a “factually dense”
23 case, “[a] finding that an agency’s position was substantially justified when the agency’s position
24 was based on violations of the Constitution, federal statute or the agency’s own regulations,
25 constitutes an abuse of discretion.” *Or. Nat. Desert Ass’n v. Rose*, 845 F. App’x 700, 702 (9th
26 Cir. 2021); *Mendenhall v. Nat’l Transp. Safety Bd.*, 92 F.3d 871, 874 (9th Cir. 1996); *see also*
27 *Jianping Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007). NMFS cannot establish that this is a
28 “rare case” where, despite its errors, both its challenged actions and litigation positions were
29

1 substantially justified. *See Versteeg v. Colvin*, No. 3:16-cv-05075-RBL, 2016 U.S. Dist. LEXIS
 2 158157, at *4 (W.D. Wash. Nov. 15, 2016); *see also Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir.
 3 2013).

4 The Ninth Circuit has long held that a BiOp's mitigation must be subject to "specific and
 5 binding plans" and "under agency control or otherwise reasonably certain to occur." *Nat'l*
 6 *Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 & n.17 (9th Cir. 2008).
 7 The SEAK BiOp came nowhere close to meeting those standards, as all three mitigation
 8 components lacked specific and binding plans and were not subject to agency control or certain
 9 to occur. Dkt. 111 at 27–31. Similarly, NMFS's regulations unambiguously require that a BiOp
 10 provide an opinion on whether the "action" is likely to jeopardize species, but NMFS omitted
 11 that key component for the prey increase program. 50 C.F.R. § 402.14(h)(1)(iv); Dkt. 111 at 31–
 12 33. NMFS's position also did not have a reasonable basis in law because the Ninth Circuit
 13 previously held that NEPA is required for an ITS authorizing salmon fisheries. *Ramsey v.*
 14 *Kantor*, 96 F.3d 434, 444 (9th Cir. 1996). Similarly, NMFS's failure to comply with NEPA for
 15 the prey increase program was not reasonable because the Ninth Circuit previously held that an
 16 agency is responsible for NEPA when it adopts actions prescribed in a BiOp. *San Luis & Delta-*
 17 *Mendota Water Auth. v. Jewell*, 747 F.3d 581, 642–55 (9th Cir. 2014).

19 Instead of conceding these errors, NMFS pursued arguments that lacked a reasonable
 20 basis in law and fact. For example, NMFS continuously represented that the mitigation was
 21 being fully implemented as contemplated, despite never developing the Hood Canal conservation
 22 hatchery program. NMFS also defended its failure to comply with NEPA despite previously
 23 acknowledging that an ITS for these very same fisheries triggered NEPA. *See* AR 47948, 47952–
 24 53. Further, NMFS represented, and the Ninth Circuit accepted, that NMFS would readopt the
 25 same fisheries ITS on remand. Fifth Knutsen Decl. 239; Dkt. 199 at 5–6. That was inaccurate, as
 26 NMFS determined on remand that new take limits on the fisheries were needed to protect
 27 SRKWs and Chinook salmon. *Supra* sec. III; *compare* AR 47518–19, *with* Fifth Knutsen Decl.
 28 75–80.
 29

B. The Conservancy's Lodestar Is Reasonable.

“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley*, 461 U.S. at 433.

1. The Conservancy's requested rates are reasonable.

The Conservancy seeks rates as summarized in the Appendix appended hereto. EAJA caps rates at \$125 per hour, adjusted for inflation², except under certain circumstances, “such as the limited availability of qualified attorneys for the proceedings involved.” 28 U.S.C. § 2412(d)(2)(A). A three-part test is used to evaluate whether to award market rates: (1) “the attorney must possess distinctive knowledge and skills developed through a practice specialty;” (2) “those distinctive skills must be needed in the litigation;” and (3) “those skills must not be available elsewhere at the statutory rate.” *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991). For ESA citizen suit claims, courts apply “prevailing market rates in the relevant legal community.” *Marbled Murrelet v. Pac. Lumber Co.*, 163 F.R.D. 308, 316 (N.D. Cal. 1995).

Kampmeier & Knutsen (and George Kimbrell and Peter M. Lacy) should be awarded market rates under EAJA.³ Those attorneys have extensive experience and expertise in federal environmental litigation. Knutsen Decl. ¶¶ 4–22, 33–42; Decl. of Emma Bruden (“Bruden Decl.”) ¶¶ 2–11; Decl. of Paul Kampmeier (“Kampmeier Decl.”) ¶¶ 2–7; Decl. of David H. Becker (“Becker Decl.”) ¶¶ 68–72. Such expertise was needed for the successful outcome of this case. Becker Decl. ¶¶ 66–67; Fifth Knutsen Decl. ¶ 23; Helverson Decl. ¶¶ 23–28. Attorneys possessing such expertise are not available at EAJA rates. Decl. of Claire Tonry (“Tonry Decl.”) ¶ 22; Fifth Knutsen Decl. ¶ 28; Kampmeier Decl. ¶ 10; Helverson Decl. ¶¶ 27–29; *see also* Becker Decl. ¶ 73. The rates sought for these attorneys are reasonable based on their “skill,

² The Ninth Circuit specifies the inflation-adjusted EAJA rates. *See* U.S. Courts for the Ninth Circuit, *Statutory Maximum Rates Under the Equal Access to Justice Act*, <https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/> (last visited Dec. 12, 2024).

³ The Conservancy is not seeking rates above EAJA’s adjusted cap for Corr Cronin, LLP.

experience, and reputation,” as well as the prevailing market rates of attorneys with comparable specialization and skills. *See Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210–11 (9th Cir. 1986); *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); Tonry Decl. ¶¶ 10–21; Fifth Knutsen Decl. ¶¶ 24–27, 42; Kampmeier Decl. ¶¶ 8–9. The rates are consistent with those recently affirmed by this Court for Kampmeier & Knutsen. *See Wild Fish Conservancy v. Wash. Dep’t of Fish & Wildlife*, No. 21-cv-169, 2024 U.S. Dist. LEXIS 59027, at *12–13 (W.D. Wash. Mar. 30, 2024); Tonry Decl. ¶ 11; Fifth Knutsen Decl. ¶ 27 & pp. 43–45.

2. The Conservancy’s requested hours are reasonable.

The Conservancy’s attorney time was necessary to effectively prosecute this case. Becker Decl. ¶¶ 30–63; Fifth Knutsen Decl. ¶¶ 43–53. The attorneys kept detailed and contemporaneous time records, provided herewith, and omitted potentially non-compensable time. Fifth Knutsen Decl. ¶¶ 29–32; Bruden Decl. ¶¶ 13–14; Kampmeier Decl. ¶¶ 11–12; Decl. of Eric Lindberg ¶¶ 7–9. This time is presumptively reasonable. *See Gates v. Gomez*, 60 F.3d 525, 534–35 (9th Cir. 1995). As the Ninth Circuit has instructed, “lawyers are not likely to spend unnecessary time on contingency fee cases,” thus, “[b]y and large, the court should defer to the winning lawyer’s professional judgment as to how much time he was required to spend on the case; after all, he won, and he might not have, had he been more of a slacker.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). “[T]he time sought by the Conservancy was reasonably expended by their attorneys to advance or protect its interests in enhancing the survival and recovery of ESA-listed orcas and Chinook salmon.” Becker Decl. ¶ 34.

C. The Conservancy Should Be Awarded a Fully Compensatory Fee.

Calculation of the lodestar “does not end the inquiry;” the Court may then “adjust the fee upward or downward” based on a consideration of the *Kerr* factors, “including the important factor of the ‘results obtained.’” *Hensley*, 461 U.S. at 434 (citation omitted); *see also Carter v. Caleb Brett LLC*, 757 F.3d 866, 868–69 (9th Cir. 2014) (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975)). The Conservancy should be awarded its full lodestar because it prevailed on all claims and achieved excellent results.

1 Plaintiffs are entitled to a “fully compensatory fee”—i.e., compensation for “all hours
 2 reasonably expended on the litigation”—when they “obtain[] excellent results.” *Hensley*, 461
 3 U.S. at 435–36. Results are excellent if plaintiffs achieve the ultimate goal of the litigation or
 4 obtain “substantial relief” or relief that “substantially advance[s] their . . . interests.” *See*
 5 *Ibrahim*, 912 F.3d at 1172, 1174; *Hensley*, 461 U.S. at 431, 438 (citations omitted). Courts
 6 “should focus on the significance of the overall relief obtained,” treating the case as an inclusive
 7 whole. *Hensley*, 461 U.S. at 435; *see Jean*, 496 U.S. at 161–62.

8 It is not “necessarily significant that a prevailing plaintiff did not receive all the relief
 9 requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief,
 10 or vice versa, may recover a fee award based on all hours reasonably expended if the relief
 11 obtained justified that expenditure of attorney time.” *Hensley*, 461 U.S. at 435 n.11; *see also Nat.*
 12 *Res. Def. Council, Inc. v. Winter*, 543 F.3d 1152, 1162–63 (9th Cir. 2008); *Ctr. for Food Safety*
 13 *v. Vilsack*, No. C-08-00484 JSW (EDL), 2011 U.S. Dist. LEXIS 144428, at *15–17 (N.D. Cal.
 14 Oct. 13, 2011); *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, 2011 U.S. Dist. LEXIS
 15 129381, at *23–26 (N.D. Cal. Nov. 8, 2011).

17 Similarly, plaintiffs who achieve an excellent outcome are entitled to a full fee award
 18 even if they do not prevail at every stage of litigation. *See Church of the Holy Light of the Queen*
 19 *v. Holder*, 584 F. App’x. 457, 458–59 (9th Cir. 2014) (awarding plaintiff fees on appeal despite
 20 losing that stage); *Geertson*, 2011 U.S. Dist. LEXIS 129381, at *20–21 & n.9 (same). “Just as
 21 time spent on losing claims can contribute to the success of other claims, time spent on a losing
 22 stage of litigation contributes to success because it constitutes a step toward victory.” *Cabrales v.*
 23 *Cnty. of L.A.*, 935 F.2d 1050, 1052 (9th Cir. 1991). Plaintiffs’ attorney should be compensated
 24 “for every item of service which, at the time rendered, would have been undertaken by a
 25 reasonable and prudent lawyer to advance or protect his client’s interest in the pursuit of a
 26 successful recovery[.]” *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982)
 27 (citation omitted). In short, if plaintiffs achieve the fundamental aims of the litigation, a fee
 28 award “should not be reduced simply because the plaintiff failed to prevail on every contention
 29

1 raised in the lawsuit,” at every phase of the litigation, or on all remedies requested; “[t]he result
2 is what matters.” *Hensley*, 461 U.S. at 435 & n.11; *Ibrahim*, 912 F.3d at 1166, 1173, 1178, 1185.

3 The Conservancy is entitled to a fully compensatory fee because it fully prevailed on its
4 claims and achieved excellent results. The Conservancy brought this case over concerns that,
5 through the SEAK BiOp, NMFS approved harvest regimes set by the 2019 Pacific Salmon
6 Treaty and mitigation for those fisheries without adequate ESA reviews and protections and
7 without any NEPA procedures. Helverson Decl. ¶¶ 13, 15–16, 18–19; Becker ¶¶ 6–7, 27. Its
8 goals were to force new ESA reviews and public vetting under NEPA. Helverson Decl. ¶ 16;
9 Becker Decl. ¶ 7.

10 The Conservancy prevailed on all claims and the Court remanded the SEAK BiOp to
11 NMFS with instructions to remedy all violations. Dkt. 111 at 25–38; Dkt. 144 at 39–40. As a
12 result, NMFS underwent two separate public NEPA processes (including public meetings and
13 comment periods and Tribal conferrals), culminating in two EISs—one for the fisheries and one
14 for the prey increase program. *See* Knutsen Decl. 50, 89. In conjunction with those NEPA
15 processes, NMFS completed two new ESA consultations and issued two new BiOps, one for the
16 fisheries and another for the prey increase program. *See id.* at 67, 100. These additional NEPA
17 and ESA processes paid off, as the new BiOps impose new and more stringent restrictions on the
18 fisheries and the prey increase program intended to protect ESA-listed species. *Supra* sec. III; *see*
19 *also* Fifth Knutsen Decl. 75–80, 107–12. Accordingly, the relief obtained was excellent and
20 accomplished the goals of the lawsuit. Helverson Decl. ¶¶ 13–22; Becker Decl. ¶¶ 6–7, 27.

21 The Conservancy did not obtain interim relief; i.e., this Court denied a preliminary
22 injunction and declined to vacate the prey increase program during the remand to NMFS, and the
23 Ninth Circuit reversed vacatur of the ITS during remand. Dkt. 51 at 18; Dkt. 144 at 39–40; Dkt.
24 199. However, those were each “simply a temporary setback on a way to a complete victory[.]”
25 *Cabrales*, 935 F.2d at 1053; Helverson Decl. ¶¶ 17–18; Becker Decl. ¶¶ 7, 28.

26 Notably, a primary reason for seeking vacatur is to ensure that the agency issues its new
27 decision promptly instead of relying on the illegal action indefinitely. *See Ctr. for Food Safety v.*
28
29

1 *Regan*, 56 F.4th 648, 672 (9th Cir. 2022) (Miller, J., dissenting); *Nat. Res. Def. Council v. U.S.*
 2 *Env't Prot. Agency*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring). Here, the
 3 Conservancy's continued pursuit of vacatur, including on appeal, compelled NMFS to provide
 4 "repeated[] commit[ments] to fixing its errors and completing a new [BiOp]" promptly. Dkt. 199
 5 at 8; *see also* Dkt. 150 ¶ 5; Helverson Decl. ¶¶ 17–18; Becker Decl. ¶¶ 27–28. The Ninth Circuit
 6 relied on NMFS's assurances in determining that remand without vacatur was sufficient. *See*
 7 Dkt. 199 at 8; *see also* Helverson Decl. ¶ 18. Fee reductions are unwarranted in such
 8 circumstances because the Conservancy's zealous efforts were all necessary steps to its ultimate
 9 victory and consistent with those of a reasonable lawyer. *Cabralles*, 935 F.2d at 1052–53; *Moore*,
 10 682 F.2d at 839; Becker Decl. ¶ 28; Knutsen Decl. ¶ 52.

12 The Conservancy, "and the orcas and Chinook salmon it sought to protect," timely
 13 obtained "new, more protective, and publicly-vetted authorizations of the Southeast Alaska
 14 fisheries and the prey increase program." Becker Decl. ¶ 8. Thus, as the prevailing party on all
 15 claims, and because it obtained excellent results—i.e., "essentially complete relief" that
 16 "substantially advanced [its] interests" and achieved the fundamental aims of the litigation—the
 17 Conservancy is entitled to a fully compensatory fee. *Hensley*, 461 U.S. at 431; Helverson Decl.
 18 ¶¶ 13, 15, 20–22; Becker Decl. ¶¶ 7, 29.

19 **D. The Conservancy Is Entitled to an Award of Its Costs.**

20 The Conservancy is also entitled to an award of its costs, including expert fees, under
 21 both EAJA and the ESA. 28 U.S.C. § 2412(a)(1), (d)(1)(A), (d)(2)(A); *Int'l Woodworkers of*
 22 *Am., AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985); 16 U.S.C. §
 23 1540(g)(4); *Pac. Lumber Co.*, 163 F.R.D. at 328.

24 The Conservancy seeks costs in the amount of \$42,410.08, as summarized in the
 25 Appendix appended hereto. These include costs and expert fees paid through the Conservancy's
 26 attorneys, expert fees paid directly by the Conservancy, and expert fees for a Conservancy-
 27 employed scientist. Knutsen Decl. ¶¶ 54–56 & pp. 30–31, 115–121; Helverson Decl. ¶¶ 30–35;
 28
 29

Decl. of Eric Lindberg ¶ 14. These were reasonable and necessary litigation costs that the Court should award. *See* Knutsen Decl. ¶ 55; Becker Decl. ¶¶ 74–75; *see* Helverson Decl. ¶ 35.

V. CONCLUSION.

For the forgoing reasons, the Conservancy respectfully requests that the Court enter an order awarding fees and costs as requested.

LCR 7(e) Certification: I certify that this memorandum contains 4,196 words, in compliance with the Local Civil Rules.

Respectfully submitted this 12th day of December 2024.

KAMPMEIER & KNUTSEN, PLLC

CORR CRONIN, LLP

By: s/ Brian A. Knutsen

Brian A. Knutsen, WSBA No. 38806

By: s/ Emma A. O. Bruden

Emma A. O. Bruden, WSBA No. 56280

1300 S.E. Stark Street, Suite 202

Portland, Oregon 97214

Tel: (503) 841-6515 (Knutsen)

(503) 719-5641 (Bruden)

Email: brian@kampmeierknutsen.com

emma@kampmeierknutsen.com

Eric A. Lindberg, WSBA No. 43596

1001 Fourth Avenue, Suite 3900

Seattle, Washington 98154

Tel: (206) 625-8600

Email: elindberg@corrchronin.com

By: s/ Erica L. Proulx

Erica L. Proulx, WSBA No. 60155

Paul A. Kampmeier, WSBA No. 31560

705 Second Avenue, Suite 901

Seattle Washington 98104

Tel: (206) 858-6983 (Kampmeier)

(206) 739-5184 (Proulx)

Email: paul@kampmeierknutsen.com

erica@kampmeierknutsen.com

APPENDIX

SUMMARY OF ATTORNEY FEES

Kampmeier & Knutsen Attorney Fee Summary

Attorney (J.D. received)	Year	Years Experience	Rate	Hours	Fees
Brian Knutsen (2004)	2019	15	\$500.00	54.9	\$27,450.00
	2020	16	\$535.00	520.1	\$278,253.50
	2021	17	\$580.00	449.2	\$260,536.00
	2022	18	\$610.00	319.7	\$195,017.00
	2023	19	\$650.00	634.4	\$412,360.00
	2024	20	\$700.00	352.6	\$246,820.00
Emma Bruden (2016)	2019	3	\$290.00	1.8	\$522.00
	2020	4	\$300.00	225	\$67,500.00
	2021	5	\$320.00	359.6	\$115,072.00
	2022	6	\$350.00	251.6	\$88,060.00
	2023	7	\$390.00	277	\$108,030.00
	2024	8	\$430.00	132.6	\$57,018.00
Erica Proulx (2022)	2024	2	\$310.00	88.6	\$27,466.00
Jessica Durney (2018)	2020	2	\$260.00	107.4	\$27,924.00
	2021	3	\$300.00	259.6	\$77,880.00
	2022	4	\$345.00	150.7	\$51,991.50
	2023	5	\$350.00	0	\$0.00
Marriah Harrod (2022)	2022	0	\$275.00	12.6	\$3,465.00
	2023	1	\$290.00	105.1	\$30,479.00
	2024	2	\$310.00	25	\$7,750.00
Paul Kampmeier (2001)	2019	18	\$545.00	0.4	\$218.00
	2020	19	\$560.00	5.7	\$3,192.00
	2021	20	\$595.00	10.2	\$6,069.00
	2022	21	\$650.00	7.8	\$5,070.00
	2023	22	\$700.00	12.6	\$8,820.00
	2024	23	\$750.00	13.9	\$10,425.00
			Total Attorney Fees:		\$2,117,388.00
Dakota Rash (2020)	2019	Law Clerk	\$168.00	60.9	\$10,231.20
Dara Illowsky (2022)	2020	Law Clerk	\$168.00	196.2	\$32,961.60
			Total Law Clerk Fees:		\$43,192.80
Total Kampmeier & Knutsen Attorney and Law Clerk Fees:					\$2,160,580.80

Corr Cronin LLP Attorney Fee Summary					
Attorney (J.D. received)	Year	Years Experience	Rate	Hours	Fees
Eric Lindberg (2010)	2019	9	\$205.25	16.9	\$3,468.73
	2020	10	\$207.78	71.1	\$14,773.16
	2021	11	\$217.54	33.3	\$7,244.08
	2022	12	\$234.95	9.2	\$2,161.54
	2023	13	\$244.62	3	\$733.86
	2024	14	\$244.62	4.1	\$1,002.94
Benjamin Byers (2017)	2019	2	\$205.25	23.6	\$4,843.90
	2020	3	\$207.78	99.1	\$20,591.00
	2021	4	\$217.54	34.7	\$7,548.64
	2022	5	\$234.95	4.5	\$1,057.28
Total Corr Cronin Attorney Fees:					\$63,425.12
Moot Attorney Fee Summary					
Attorney (J.D. received)	Year	Years Experience	Rate	Hours	Fees
George Kimbrell (2004)	2024	20	\$700.00	7	\$4,900.00
Peter M. Lacy (2001)	2024	23	\$750.00	10.1	\$7,575.00
Total Moot Attorney Fees:					\$12,475.00
Total Attorney and Law Clerk Fees:					\$2,236,480.92

SUMMARY OF COSTS AND EXPERT FEES		
Costs Paid by Kampmeier & Knutsen, PLLC		
Date	Item	Case Costs
1/9/2020	postage for notice letter	\$38.00
3/18/2020	district court filing fee	\$400.00
3/19/2020	postage for service of summonses and complaint	\$58.80
4/22/2020	FedEx costs for copying and mail judge's copies of PI filings	\$86.26
6/16/2020	invoice for transcript from hearing before Magistrate on motion for preliminary injunction	\$277.95
12/23/2020	postage to send WFC flashdrive with materials from NMFS re: PST funds	\$5.59
6/10/2021	Invoice for Expert Work from Gordon Luikart	\$3,080.00
8/19/2021	invoice for transcript from summary judgment hearing	\$331.50
8/31/2021	second invoice for transcript from summary judgment hearing	\$8.50
5/12/2022	invoice from Dr. Luikart for 5/1/2022 invoice for work on third declaration	\$990.00
11/7/2022	invoice for transcript of hearing on remedy motion	\$419.65
5/4/2023	Ninth Circuit Cross Appeal filing fee	\$505.00
12/6/2023	invoice for copying and delivery of first appellate brief and supplemental excerpts of record	\$760.83
3/1/2024	invoice for copying and delivery of appellate reply brief and further excerpts of record	\$162.09
5/16/2024	flight to SF for 9th Circuit argument in July	\$712.38
5/19/2024	hotel reservations for 9th circuit argument in San Fransisco	\$835.56
7/18/2024	transportation costs for EB and BAK for 9th Circuit argument in San Francisco (Uber/BART/Taxis)	\$208.87
7/18/2024	meal costs for EB and BAK for 9th Circuit argument in San Francisco	\$282.10
11/22/2024	invoice from D. Becker for declaration iso fee petition	\$14,925.00
Total Costs Paid by Kampmeier & Knutsen:		\$24,088.08
Costs Paid by Corr Cronin, LLP		
	Teleconference and Legal Research Services	\$658.00

Costs Paid by Wild Fish Conservancy		
<u>Invoice Date</u>	<u>Item</u>	<u>Payee</u>
4/18/2020	Invoice from Dr. Robert Lacy; PVA analysis for SRKWs	\$4,000.00
6/7/2022	Invoice from Dr. Hans Radtke; Economic analysis and declaration work	\$3,000.00
6/7/2022	Invoice from The Research Group (Shannon Davis) Economic modeling in collaboration with Dr. Radtke	\$9,000.00
Total Costs Paid by Wild Fish Conservancy:		\$16,000.00
Wild Fish Conservancy In-House Expert Fees		
<u>Expert</u>	<u>Work Performed</u>	<u>Fees</u>
N. Gayeski, Ph.D.	prepared declaration in support of Ninth Circuit motion for injunction pending appeal	\$1,664.00
Total Costs and Expert Fees:		\$42,410.08